

**UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK**

In re:)	Chapter 15 Case
FAIRFIELD SENTRY LIMITED, et al.,)	Case No: 10-13164 (SMB)
Debtors in Foreign Proceedings.)	(Jointly Administered)
FAIRFIELD SENTRY LIMITED (IN LIQUIDATION), et al.,)	Adv. Pro. No. 10-03496 (SMB)
Plaintiffs,)	(Administratively Consolidated)
-against-)	
THEODOOR GGC AMSTERDAM, et al.,)	
Defendants.)	
This declaration applies to the Adversary Proceedings listed on Exhibit 1)	

DECLARATION OF MARSHALL R. KING
IN SUPPORT OF DEFENDANTS' RENEWED MOTION TO DISMISS

I, Marshall R. King, declare as follows:

1. I am a partner at the law firm of Gibson, Dunn & Crutcher LLP, counsel for Defendants UBS AG (sued as UBS AG New York, UBS Zurich and UBS AG Zurich); UBS Jersey Nominees Limited (sued as UBS Jersey Nominees); UBS Fund Services (Cayman) Limited; UBS Europe SE, Luxembourg Branch; and UBS Fund Services (Ireland) Ltd. (hereinafter, the "UBS Defendants") in the adversary proceedings listed on Exhibit 1.

2. The UBS Defendants hereby join in the Defendants' Renewed Motion to Dismiss filed on March 16, 2020, as ECF Document No. 2903 in Adversary Proceeding No. 10-03496, and incorporate the documents submitted in support thereof.

3. The UBS Defendants submit this Declaration in support of the Defendants' Renewed Motion to Dismiss for the limited purpose of identifying and explaining certain publicly-available documents filed contemporaneously herewith, of which the Court may take judicial notice. As explained below, these documents evidence that UBS AG, UBS Jersey Nominees Limited, UBS Fund Services (Cayman) Limited and UBS Europe SE, Luxembourg Branch operated as either "commercial or savings bank[s]" or "trust company[ies]" between January 1, 2004 and December 31, 2008 and were therefore "financial institution[s]" within the meaning of 11 U.S.C. § 101(22). Thus, they qualify for the protections of the safe harbor provision of 11 U.S.C. § 546(e), as set forth in Section I.D of the Defendants' Renewed Motion to Dismiss. Separately and independently, the safe harbor provision also applies to UBS Fund Services (Cayman) Limited because it qualifies as a "financial participant" within the meaning of 11 U.S.C. § 101(22A).

UBS AG: Adv. Pro. Nos. 10-3635, 10-3636, 10-3780 and 11-1258

4. UBS AG hereby joins in the Supplemental Memorandum of Swiss Financial Institution Defendants in Support of Defendants' Renewed Motion to Dismiss, filed on March 19, 2020, as ECF Document No. 2924 in Adversary Proceeding No. 10-03496, and incorporates the documents submitted in support thereof.

5. Attached hereto as Exhibit 2 are true and correct copies of UBS AG's Articles of Association, included as Exhibit 1.1 to UBS AG's Form 20-F submissions to the U.S. Securities and Exchange Commission ("SEC") from 2004 through 2009, stating that UBS AG's purpose during that time period was the "operation of a bank" with its scope of operations "extend[ing] to all types of banking [and] financial . . . activities in Switzerland and abroad." *See* Ex. 2 at 5

(2004 Articles of Association), 27 (2005), 49 (2006), 72 (2007), 95 (Feb. 27, 2008), 121 (Nov. 27, 2008).

6. Attached hereto as Exhibit 3 is a true and copy of a certified excerpt of UBS AG's entry in the Commercial Register of Zurich, Switzerland. Attached hereto as Exhibit 3(A) is a true and correct copy of an English translation of the document's headings and the "purpose" section, stating that UBS AG was entered into the Commercial Register on February 28, 1978 and that "the purpose of the company is to conduct banking operations." This document is accessible at the web address: <https://zh.chregister.ch/cr-portal/auszug/auszug.xhtml?uid=CHE-101.329.561>.

UBS Jersey Nominees Limited: Adv. Pro. Nos. 10-3635 and 10-3636

7. Attached hereto as Exhibit 4 is a true and correct copy of SBC Jersey Nominees Limited's 1988 Memorandum and Articles of Association, stating that the "objects for which the Company is established" are, in relevant part, "to hold in trust . . . and deal with, manage, and turn to account, any real or personal property of any kind, and in particular, shares, stocks [and] securities" and "to act as a trustee or manager of, or as depositary for, any unit or other trust . . . and to act as agent for the sale of any such certifications or instruments." *See* Ex. 4 at 3.

8. Attached hereto as Exhibit 5 is a true and correct copy of a Certificate from the States of Jersey dated June 29, 1998, stating that SBC Jersey Nominees Limited had changed its name by special resolution and had entered into the Jersey Register of Companies under the name of "UBS Jersey Nominees Limited." Exhibits 4 and 5 are accessible on the Jersey Financial Services Commission's website at https://www.jerseyfsc.org/#search_registry.

9. Attached hereto as Exhibit 6 is a true and correct copy of a letter from the Jersey Financial Services Commission dated March 12, 2020, indicating that UBS Jersey Nominees

Limited was “registered under the Financial Services (Jersey) Law 1998 to conduct Trust Company Business” from June 14, 2001 to October 19, 2018.

UBS Fund Services (Cayman) Limited: Adv. Pro. No. 10-4095

10. Attached hereto as Exhibit 7 is a true and correct copy of a Certificate of Incorporation on Change of Name dated December 11, 2015, from the Registry of Companies, Cayman Islands, stating that UBS Fund Services (Cayman) Limited changed its name to “MUFG Alternative Fund Services (Cayman) Limited” on December 11, 2015.

11. Attached hereto as Exhibit 8 is a true and correct copy of a letter from the Cayman Islands Monetary Authority (“CIMA”) dated March 12, 2020, indicating that MUFG Alternative Fund Services (Cayman) Limited is “the holder of a Category ‘A’ Banking and Trust Licence” that was issued on September 19, 1972.

12. Attached hereto as Exhibit 9 is a true and correct copy of certain records from CIMA, indicating that MUFG Alternative Fund Services (Cayman) Limited has been a holder of a “Banking Class A” and “Trust” license since September 19, 1972. This document is accessible on CIMA’s website at <https://www.cima.ky/search-entities>.

13. Attached hereto as Exhibit 10 is a true and correct copy of an excerpt of the Third Am. Complaint, stating that “[d]uring the period from and after September 16, 2008 through November 19, 2008, UBS Fund Services [(Cayman) Limited] received Redemption Payments totaling USD \$198,919,401.20 from Sentry in respect of Shares tendered for redemption,” *Fairfield Sentry Limited (in Liquidation) v. UBS Fund Services (Cayman) Limited*, Adv. Pro. No. 10-4095 (SMB) (Bankr. S.D.N.Y. Jan. 10, 2020) (Dkt. 91) ¶ 43, thus, exceeding the financial threshold laid out in the U.S. Bankruptcy Code’s definition of financial participant. *See* 11 U.S.C. § 101(22A) (defining “financial participant,” in relevant part, as any entity that has more

than \$100 million in “gross mark-to-market positions” in one or more securities contracts).

Because the notices of redemption involved the “repurchase” of shares, the notices qualify as securities contracts and the redemptions were made in connection with a securities contract. *See In re Tribune Co. Fraudulent Conveyance Litig.*, 946 F.3d 66, 81 (2d Cir. 2019) (“[A]ll of the payments at issue, including those connected to the redemption of shares, were ‘in connection with a securities contract.’”).

UBS Europe SE, Luxembourg Branch: Adv. Pro. No. 11-1250

14. UBS Europe SE, Luxembourg Branch was previously known as UBS (Luxembourg) S.A. Attached hereto as Exhibit 11 is a true and correct copy of the Shareholder Name Change Stipulation, *Fairfield Sentry Limited (in Liquidation) v. UBS Europe SE, Luxembourg Branch*, Adv. Pro. No. 11-1250 (SMB) (Bankr. S.D.N.Y. Nov. 27, 2017) (Dkt. 63), stating that as of December 1, 2016, the assets and liabilities of UBS (Luxembourg) S.A. were transferred to UBS Deutschland AG, which in turn adopted the legal form of a European Company “SE” named “UBS Europe SE” and continued the activities of UBS (Luxembourg) S.A. without interruption under the name UBS Europe SE, Luxembourg Branch. *See* Ex. 11 at 2.

15. Attached hereto as Exhibit 12 is a true and correct copy of excerpts of the 2004-2008 Annual Reports of UBS (Luxembourg) S.A., as filed in the Luxembourg Business Registers, stating that “the main activities of the Bank are wealth management, investment advice and custodian bank services.” *See* Ex. 12 at 17 (2004 Annual Report), 32 (2005 Annual Report), 48 (2006 Annual Report), 68 (2007 Annual Report). In 2008, the language was modified slightly to state that “the main activities of the Bank are wealth management, structured solutions for key client, and custodian bank services, and the service hub, that provides services to other UBS group entities.” *See* Ex. 12 at 90 (2008 Annual Report). These records are

accessible by searching the Luxembourg Business Registers at the web address: www.lbr.lu.

Attached hereto as Exhibit 12(A) is a true and correct copy of an English translation of the government certification that appears on the first page of each Annual Report.

16. Attached hereto as Exhibit 13 is a true and correct copy of the November 2012 by-laws of UBS (Luxembourg) S.A., as filed in the Official Gazette of the Grand Duchy of Luxembourg, stating that “[t]he object of the company is the execution of bank operations. In this capacity, the company is entitled to conduct all banking transactions and all business relating in any way to banking transactions, on its own or another party’s behalf.” *See* Ex. 13 at 8.

Attached hereto as Exhibit 14 is a true and correct copy of the UBS (Luxembourg) S.A., February 2012 entry in the Official Gazette of the Grand Duchy of Luxembourg. Attached hereto as Exhibit 14(A) is a true and correct copy of an English translation of the February 2012 Gazette entry, stating that the by-laws were modified in February 2012 for the first time since 1998 to “expan[d] [] the company’s purpose to enable it to act as an insurance broker.” *See* Ex. 14(A) at 2. Thus, the language in the November 2012 by-laws stating that UBS Luxembourg’s object was to “execut[e] bank operations” was in effect during 2004 to 2008.

17. Attached hereto as Exhibit 15 is a true and correct copy of the Official Gazette of the Grand Duchy of Luxembourg dated February 16, 2017. Attached hereto as Exhibit 15(A) is a true and correct copy of an English translation of the entry, stating that the following changes were to be made to the “table of banks established in Luxembourg in accordance with the amended Law of 5 April 1993 on the financial sector.” Ex. 15(A) at 1. UBS (Luxembourg) S.A. is listed as one of the “Banks authorized to operate in accordance with Article 2 of the amended law of 5 April 1993 on the financial sector” to be removed from the table and “UBS Europe SE, Luxembourg Branch” was to be added. *Id.* Exhibits 13–15 are accessible by searching the

records of the Official Gazette of the Grand Duchy of Luxembourg at the web address:

<http://www.legilux.lu/memorialC/archives>.

18. Attached hereto as Exhibit 16 is a true and correct copy of a letter from the Banking Supervision division of the European Central Bank dated April 11, 2017, stating that “authorisation of UBS (Luxembourg) S.A. (the ‘Supervised Entity’) as originally issued on 20 August 1973 has lapsed. . . due to the merger by absorption of the Supervised Entity with UBS Deutschland AG.” This confirms that, at all times relevant to this adversary proceeding, UBS (Luxembourg) S.A. was a supervised bank under the auspices of the European Central Bank or its predecessor regulators.

19. Attached hereto as Exhibit 17 is a true and correct copy of UBS (Luxembourg) S.A.’s entry in the Luxembourg Business Registers, stating that UBS (Luxembourg) S.A. was registered under the European Union industry code for “Banks” from August 27, 1973 to January 18, 2017. This record is accessible by searching the Luxembourg Business Registers at the web address: www.lbr.lu.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on: March 23, 2020

/s/ Marshall R. King
Marshall R. King